Supreme Court, U.S.
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No.__

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

Tasker Generes, Petitioner

v.

Patricia Morrell and Edward L. Morrell, Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

APPENDIX "A"
TO
PETITION FOR WRIT OF CERTIORARI

I. SEVENTH CIRCUIT OPINION
II. DISTRICT COURT OPINION
III. BANKRUPTCY COURT ORDERS ON NEW TRIAL MOTION
IV. MOTION FOR NEW TRIAL

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June 19, 1996

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I.

IN THE MATTER OF: DOROTHY GENERES, Debtor, and TASKER GENERES, Debtor-Appellant.
IN THE MATTER OF: DOROTHY GENERES and TASKER GENERES, Debtors-Appellees. APPEAL OF: EDWARD L. MORRELL and PATRICIA MORRELL

No. 94-1647, No. 94-2213

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

69 F.3d 821; 1995 U.S. App. LEXIS 31339; Bankr. L. Rep. (CCH) P76,689

April 17, 1995, Argued November 3, 1995, Decided

SUBSEQUENT HISTORY: [*1]

Counsel Amended January 17, 1996.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 5884. George M. Marovich, Judge.

COUNSEL: For EDWARD L. MORRELL, PATRICIA MORRELL, Appellees (94-1647), Appellants (94-2213): David B. Kahn, Mark E. King, KAHN & ASSOCIATES, Northfield, IL.

For TASKER GENERES, Debtor - Appellant (94-1647): Christopher R. Smith, SMITH, WILLIAMS & LODGE, Chicago, IL. Lynn D. Dowd, LEVIN, MCPARLAND, PHILLIPS, LEYDIG & HABERKORN, Chicago, IL.

For TASKER GENERES, Debtor - Appellee (94-2213): Lynn D. Dowd, LEVIN, MCPARLAND, PHILLIPS, LEYDIG & HARBERKORN, Chicago, IL.

JUDGES: Before CUMMINGS, COFFEY and EASTERBROOK, Circuit Judges.

OPINIONBY: COFFEY

OPINION: COFFEY, Circuit Judge. The dispute in this case arises from an adversary proceeding in the bankruptcy court concerning a two-month extension of a lease for a family home owned by the debtor, Tasker Generes, and rented to Edward and Patricia Morrell (the Morrells). The bankruptcy court determined that an oral agreement had been made between Generes and the Morrells to extend the lease. Generes appealed to the district court and lost; he now appeals to this court. The Morrells appeal the district court's decision not to impose sanctions in the form of attorneys' fees against Generes for filing a frivolous appeal in the district court. We affirm in part and reverse in part, and impose sanctions against Generes for pursuing a frivolous appeal in this court.

I. Background

The Morrells occupied and owned a family home in Northfield, Illinois, that was partially destroyed by fire in December 1990. No one was injured and the house was temporarily uninhabitable, but the [*2] Morrells and their four children were forced to find temporary housing while the repair work was being completed. Authorized by their insurance company and aided by an attorney, the Morrells signed a six-month lease with Tasker Generes to rent a home owned by Generes in Northbrook, Illinois. Generes, a practicing attorney for almost twenty years, resided next door.

The lease was for a term of six months and provided for a monthly rent of $ 2200, to be paid by the 18th of the preceding month, and a security deposit of $ 4400. Under the six-month term of the agreement, the Morrells were to vacate the premises by June 17, 1991. However, the lease contained a holdover provision in the event that the Morrells remained in possession of the house beyond the lease's original term. n1 The Morrells paid the security deposit and first month's rent and moved in on December 18, 1990.

----------Footnotes----------

n1 The holdover provision provided: If the Lessee retains possession of the Premises or any part thereof after the termination of the term by lapse or otherwise, then the Lessor may at the Lessor's option within thirty days after the termination of the term serve written notice upon Lessee that such holding over constitutes either (a) renewal of the lease for one year, and from year to year thereafter, at double the rent specified under Section 1 for such

period, or (b) creation of a month to month tenancy, upon the terms of this lease except at double the monthly rent specified under Section 1, or (c) creation of a tenancy at sufferance, at a rental of [blank] dollars per day for the time Lessee remains in possession. If no such written notice is served then a tenancy at sufferance with rental as stated at (c) shall have been created. Lessee shall also pay to Lessor all damages sustained by Lessor resulting from retention of possession by Lessee.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*3]

There is no dispute that for the six month term of the original written lease, the Morrells paid each month's rent on time, usually by dropping off the rent-check at the Generes residence next door. However, the Morrells did not vacate the house by June 17, 1991, as originally agreed, but remained in possession for another two months pursuant to an oral agreement with Generes, the existence of which Generes denies. The Morrells paid rent of $ 2200 for the two additional months, although the July rent, due June 17, was not paid until July 6.

The Morrells vacated the premises on August 18, 1991 and contacted Generes about the return of their $ 4400 security deposit. Generes did not return the security deposit.

In late August 1991, Generes filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code and the Morrells filed a timely claim for the return of the $ 4400 security deposit. Generes disputed the claim and filed an adversary proceeding against the Morrells in bankruptcy court, seeking eight months of unpaid rent and $ 8000 of alleged property damage. n2 In his complaint, Generes alleged that there had been no oral agreement to extend the lease, but instead a [*4] holdover tenancy had been created by the Morrells remaining on the property, which obligated the Morrells to pay twelve months of rent according to the holdover provision in the written lease. n3 Further, Generes asserted that on July 1, 1991, he delivered a letter to the Morrells in which he exercised his right under the terms of the written lease to create the holdover tenancy.

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n2 Generes alleged that the Morrells's children had caused damage to the interior walls of the property. However, two weeks

before trial, the bankruptcy court granted Generes's request to voluntarily dismiss the property damages claim.

n3 Generes's claims against the Morrells under the lease totalled $ 27,027 plus attorneys fees and other costs.

----------End Footnotes----------

On June 30, 1993, the bankruptcy court held a hearing on the matter, receiving testimony from Generes, the Morrells, and the Morrells's contractor. According to the Morrells, in the spring of 1991, the contractor who was repairing their home informed them that the work would not be completed [*5] until mid-August. The Morrells testified that they then contacted Generes and requested and received a two-month extension of their lease at the same rate.

Generes testified that no such oral agreement was made. Further, he stated that the first action taken was on July 1, 1991, when he prepared a letter to the Morrells, in which he exercised his right to create a holdover tenancy for a term of one year due to the Morrells' continued occupancy of the property. However, Generes conceded that he did not mail the letter or hand-deliver it to anyone at the rental property, but instead dropped it inside the Morrells' unlocked front door.

Recognizing that the decision boiled down to a credibility determination, the bankruptcy court made the following findings:

I have listened to all of the witnesses and I have observed their demeanor in court. I will find that in fact, there was an agreement between Mr. Generes and the Morrells whereby the original period of the lease was extended for two months and two months only. That notice was not delivered to the Morrells on July 1.

The placing of the notice on the floor in the house is not delivery of the notice, and nor was the intent [*6] to treat them as holdover tenants in any way communicated to the Morrells during the periods at issue. That's up through and including June 1992.

The Morrell's testimony makes it clear. I believe Mr. Generes understood that the Morrells were only interested in renting until such time as their house was repaired. Given that their failure to respond to the alleged notice of July 1, 1991, would seem to raise a real issue to Mr. Generes as to what was going on. He understood that they didn't intend to live in this property forever, and they certainly understood that.

I just cannot understand why he assumed that their failure to respond to this alleged notice was an agreement on their part of his right to treat them as a hold-over tenant. That's simply inconsistent with all of the circumstances of the case, and I just don't think that the delivery of the notice was reasonable under the circumstances. Nor, in fact, do I believe the notice was delivered at all or prepared at all.

Generes filed a motion for a new trial, which was denied, and he then appealed to the district court, claiming that the bankruptcy court had erred both in finding that an oral agreement had extended the lease [*7] and in refusing Generes an opportunity to present closing arguments. The Morrells cross-appealed, seeking attorneys' fees and costs.

The district court affirmed the bankruptcy court's findings. Also, the district court determined that Generes's action in the bankruptcy court warranted sanctions either under Fed. R. Civ. P. 11 (or its equivalent Bankruptcy Rule 9011) or under the court's inherent power to sanction bad-faith conduct, and it awarded attorneys' fees and costs for the Morrells, remanding the case to the bankruptcy court to determine the appropriate amount. n4 The Morrells then filed a motion for attorneys' fees as a sanction for Generes's appeal from the bankruptcy court, which the district court denied without stating any reasons. Generes appeals the district court's decision, and the Morrells cross-appeal, seeking the award of sanctions for Generes's conduct in the district court as well as his pursuit of a frivolous appeal in this court.

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n4 The remand has been stayed pending disposition of the appeal in this court.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*8]

II. Analysis

Generes asks this court to reverse the bankruptcy court's factual finding that he and the Morrells orally agreed to extend the term of the written lease. Under Bankruptcy Rule 8013, this court reviews the bankruptcy court's findings of fact for clear error. In re Lloyd, 37 F.3d 271, 274 (7th Cir. 1994); In re Tolona Pizza Products Corp., 3 F.3d 1029, 1034 (7th Cir. 1993) ("The district court must accept the bankruptcy court's findings of fact unless they are

clearly erroneous. The court of appeals also must restrict its review of factual findings to this narrow standard.") (quoting In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985)).

Generes argues, essentially, that the bankruptcy court should have believed his testimony and not that of the Morrells. However, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." Anderson v. Bessemer City, 470 U.S. 564, 575, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). Generes seeks a pure review of credibility: he presents [*9] no extrinsic evidence that would undermine the trial court's decision to choose the Morrells's version of events over that presented by Generes. Although Generes seeks to persuade us that his version of events is more believable, our role is not to reweigh the evidence or make de novo factual determinations. Dunning v. Simmons Airlines Inc., 62 F.3d 863, 868 (7th Cir. 1995) ("We refuse to second-guess the court's credibility determinations because the judge has had the opportunity to observe the verbal and nonverbal behavior of the witnesses focussing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements, rather than looking at the cold pages [of a transcript]."). Other than rearguing his own version of the facts, Generes has offered neither caselaw nor any facts or circumstances much less logical reasoning why we should disturb the credibility determinations of the bankruptcy court. Accordingly, we affirm the district court's decision to affirm the bankruptcy court's finding that the parties made an oral agreement to extend the lease for an additional two months.

Generes contends [*10] that even assuming that an oral agree ment extended the lease, the Morrells were 18 days late with the rent payment for the first month of the two month extension. This tardiness, Generes argues, caused a breach of the lease and wrongful possession of the property. Generes's argument is misguided. The oral agreement extended the written lease for two months, and under the terms of the written lease late payment does not result in forfeiture of the property.

Turning from the merits of the case, Generes maintains that the bankruptcy court denied him the constitutional right to present closing arguments. Although closing arguments are required in a criminal case under the Sixth Amendment's right to effective assistance of counsel, Herring v. New York, 422 U.S. 853, 45 L. Ed. 2d 593, 95 S. Ct. 2550 (1975), Generes has supplied no authority for the proposition that closing arguments are a constitutional right in civil cases and nor have we been able to find any. Indeed, Illinois courts have held that "oral argument in a civil proceeding tried before a court without a jury is a privilege, not a right, which is accorded to the parties by the court in its discretion." Korbelik v. Staschke, 232 Ill. App. 3d 114, 596 N.E.2d 805, 808, 173 Ill. Dec. 181 (Ill. App. [*11] 1992). Further, Generes has provided no historical argument or persuasive justification why the Due Process Clause of the Fifth Amendment should be read to require closing arguments at his trial: a four-hour hearing in bankruptcy court.

Finally, Generes and the Morrells dispute the district court's disposition of sanctions. Generes claims the district court erred in awarding attorneys' fees and costs for the bankruptcy proceeding; the Morrells argue the district court did not go far enough and that they deserve attorneys' fees for Generes's conduct in the bankruptcy court, as well as in the district court and the court of appeals.

Although the district court found that Generes's conduct warranted sanction under Rule 11 of the Federal Rules of Civil Procedure (or its equivalent bankruptcy rule 9011), the court determined that the full range of Generes's conduct was not covered by the federal rules, and therefore the court invoked its inherent power to award attorney's fees as a sanction for bad faith litigation. See Chambers v. NASCO Inc., 501 U.S. 32, 33, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991) ("the court may safely rely on its inherent power [to impose attorney's fees as a sanction] if, in its informed discretion, [*12] neither the statutes nor the rules are up to the task."). In holding that the court's inherent power should be levied against Generes, the district judge stated:

In the instant case, the record reflects that Generes' conduct rivals that of the defendant in Chambers, who not only filed false

and frivolous pleadings, but committed perjury and harassed his opponents. Furthermore, Generes used these proceedings as a vehicle for making serious and scandalous allegations which are totally bereft of any basis in fact or law, including claims that the Morrells committed arson and insurance fraud, and objected to his reorganization plan in bad faith. Generes also improperly disclosed the contents of settlement negotiations and accused the trial judge of improper ex parte communications with opposing counsel without any substantiation whatsoever.
(Order at 22).

Generes argues that sanctions should not have been imposed for his conduct in the bankruptcy court. We review the imposition of such sanctions for an abuse of discretion. Matter of Excello Press Inc., 967 F.2d 1109, 1112 (7th Cir. 1992) (sanctions imposed under bankruptcy rule 9011 reviewed for an abuse of discretion); [*13] Chambers, 501 U.S. at 50 (a federal court's inherent power to sanction bad faith conduct is reviewed for an abuse of discretion). As the district court described above, Generes's filings and actions in this matter were characterized by unsubstantiated accusation. Based on the facts of this case, as well as the caselaw applicable thereto, we hold that the district court acted within its discretion in imposing sanction for Generes's conduct in the bankruptcy court.

The Morrells argue that the district court should also have imposed sanctions for Generes's appeal to the district court, as well as for his actions in bankruptcy court. In evaluating Generes's conduct, the district court determined that Generes had violated Rule 11 of the Federal Rules of Civil Procedure because the appellate brief filed by Generes in the district court was devoid of reasonable inquiry into either the facts or law of the case, and the district judge stated that "Generes fills his 33 pages with equal parts irrelevance, innuendo, conjecture and other unsupported legal and factual assertions." Moreover, the district court continued, "the briefs which Generes submitted to this court are poorly organized, replete [*14] with typographical and grammatical errors, and sorely lacking in relevant legal authority." Although Generes acted pro se, the district court found that he was a licensed attorney who had practiced law for twenty years. However, despite finding that Generes had specifically violated

Rule 11, the district court in the exercise of its discretion declined to impose sanctions.

Our analysis of the district court's denial of sanctions is complicated by the amendment to Rule 11, which took effect while the action was pending before the district court.

The old version of Rule 11 provides, in relevant part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary [*15] delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction."

Fed. R. Civ. P. 11 (1993) (emphasis added).

Taking effect on December 1, 1993, the amended version of Rule 11 governs "all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 146 F.R.D. 404 (Apr. 22, 1993) (Supreme Court order amending the Federal Rules of Civil Procedure). The amended version provides, in relevant part:

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses and other legal contentions [*16] therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . . (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b)

has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. Fed. R. Civ. P. 11 (1994) (emphasis added). "Thus, under the amended version, the imposition of sanctions for a Rule 11 violation is discretionary rather than mandatory." Knipe v. Skinner, 19 F.3d 72, 78 (2d Cir. 1994). See also Cunningham v. Waters Tan & Co., 65 F.3d 1351, 1360 (7th Cir. 1995); Land v. Chicago Truck Drivers Union, 25 F.3d 509, 515 (7th Cir. 1994).

We have held that applying the amended version of Rule 11 to pending cases is not "just and practicable" where the conduct, motions, and decision of the district court occurred before the December 1, 1993, effective date. See Cunningham, 65 F.3d at 1361 ("Plaintiffs' counsel's conduct should be judged under the standards applicable when the action took [*17] place."); Land, 25 F.3d at 516 ("Both at the time Land filed his complaint and when the Fund moved for sanctions, the old Rule 11 was in effect, and both parties were presumably operating under the standards and procedures propounded in that rule. Counsel's conduct should therefore be judged under those standards."). In this case, Generes's opening brief was filed November 15, 1993, before the effective date. Although the district court's decision and the Morrells's motion for sanctions were filed after December 1, 1993, the district court applied the old version of Rule 11 when concluding Generes had committed sanctionable conduct. We believe that it is just and practicable to apply the version of Rule 11 that the district court itself applied and was in effect at the time Generes appealed from bankruptcy court and filed his brief in the district court, that is, the old version of the Rule.

The district court's initial determination that Rule 11 had been violated is reviewed for an abuse of discretion. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989) (en banc). Because of the frivolous nature of Generes's appeal from the bankruptcy court, as described [*18] above by the district court, we hold that there was no abuse of discretion in finding that Generes had failed to make a reasonable inquiry into the law and facts of the case, including Generes's unsubstantiated allegations against the Morrells. Therefore, under the old version of Rule 11,

sanctions are mandatory once the district court has identified a violation. Cunningham, 65 F.3d at 1360. Because the district court did not impose sanctions for the conduct that it found violated Rule 11, we remand the case to the district court for the imposition of an appropriate sanction. See Ross v. City of Waukegan, 5 F.3d 1084, 1088 (7th Cir. 1993) ("the imposition of sanctions, when Rule 11 had been violated, is mandatory."). n5

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n5 Further, even if we were to apply the amended version of Rule 11, we believe that the district court abused its discretion in that it found Generes's behavior was egregious and sanctionable, and yet it denied sanctions without explanation. See LaSalle Nat. Bank v. County of DuPage, 10 F.3d 1333, 1338 (7th Cir. 1993) ("We have held that a district court abuses its discretion when it denies sanctions without explanation."). Although a deferential standard of review is required for Rule 11 determinations, this review "is not toothless." Land, 25 F.3d at 515.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*19]

Finally, the Morrells ask us to sanction Generes for pursuing a frivolous appeal in this court. As well as appealing the imposition of sanctions, Generes requested us to overturn a well-supported credibility determination of the bankruptcy court. With regards to the district court's decision that Generes had engaged in frivolous and sanctionable conduct before it and the bankruptcy court, "courts of appeals have ample authority to protect the beneficiaries of Rule 11 sanctions by awarding damages and single or double costs under Rule 38--which they may do . . . when the appellant had no reasonable prospect of meeting the difficult standard of abuse of discretion." Kale v. Obuchowski, 985 F.2d 360, 363 (7th Cir. 1993) (quoting Cooter & Gell v. Hartmarx Co., 496 U.S. 384, 408, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990)).

An appeal is frivolous when "the result is foreordained by the lack of substance to the appellant's arguments." Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989) (en banc). Generes has offered no justification for his conduct in the district court, other than to re-assert his own version of the facts, arguing that we should believe him and not the Morrells. We have previously [*20] held such appeals frivolous and sanctionable. See Rennie v. Dalton, 3 F.3d 1100, 1111 (7th Cir. 1993)

("Accordingly, we believe Rennie's appeal was frivolous as all she did was restate and reargue facts and credibility issues previously ruled upon in the district court."). Although we reserve the discretion to withhold sanctions, Colosi v. Electri-Flex Co., 965 F.2d 500, 504 (7th Cir. 1992), in Generes's case we conclude that the substance of the appeal is clearly frivolous and sanctions are appropriate. Pursuant to Circuit Rule 38, we must provide reasonable notice to counsel that we are contemplating sanctions and give an opportunity to respond. Counsel for Generes shall submit a response to the question of the amount of sanctions imposed to the clerk of this Court within fifteen days of the date of this opinion. Counsel for the Morrells shall also submit to the clerk of this Court within fifteen days an accounting of attorney's fees and costs incurred in this appeal.

The judgment of the district court is AFFIRMED in part and REVERSED in part.

II.

IN RE: TASKER GENERES and DOROTHY GENERES,
Joint Debtors.
TASKER GENERES, Plaintiff-Appellant-Cross-Appellee,
v.
EDWARD L. MORRELL and PATRICIA MORRELL,
Defendants-Appellees-Cross-Appellants
93 C 5884
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
165 Bankr. 1011; 1994 U.S. Dist. LEXIS 3138
March 10, 1994, Decided March 15, 1994, Docketed
PRIOR HISTORY: [**1] Appeal from Adv. No. 92 A 1283, Chapter 11, 91 B 17220, Judge Coar
JUDGES: MAROVICH
OPINIONBY: GEORGE M. MAROVICH
OPINION: [*1014] MEMORANDUM OPINION AND ORDER

Joint debtors Tasker and Dorothy Generes ("Generes"), filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Plaintiffs Edward and Patricia Morrell ("the Morrells") filed a claim for the return of a security deposit pursuant to the terms of a written lease agreement with debtors. Generes counterclaimed, contesting Morrell's security deposit claim and requesting property damages, unpaid rent, and late fees incurred during a purported holdover tenancy by the Morrells. The question presented before the Bankruptcy Court was whether the Morrell's two-month stay beyond their six-month written lease ("lease") was under the terms of an oral extension as the Morrells claimed, or an unauthorized holdover, as Generes alleged. The Bankruptcy Court questioned the credibility of Mr. Generes' testimony and the existence and delivery of a holdover notice allegedly prepared by Generes. Consequently, the Bankruptcy Court granted the Morrell's security deposit claim and denied Generes' counterclaim for unpaid rent and damages. [**2] The Bankruptcy Court stipulated that each party was to bear his own costs. Generes appealed the Bankruptcy Court's decision, claiming that the trial court abused its discretion in finding that an oral agreement modified and extended the terms

of the original written lease such that no holdover tenancy was created. Generes also claimed that the trial court erred in refusing to allow Generes' closing argument. The Morrells cross-appealed, claiming that the trial court abused its discretion by failing to award the Morrells costs and attorney's fees inasmuch as Generes, an attorney who represented himself pro se, had perjured himself during the bankruptcy proceeding. For the reasons set forth below, we deny Generes' claim that the trial court abused its discretion in finding that an oral lease was created and in denying Generes' request for closing argument. We grant the Morrell's request for costs and attorney's fees pursuant to the trial court proceedings. We therefore remand this case for determination of appropriate costs and attorneys' fees.

FACTUAL AND PROCEDURAL BACKGROUND

I. Statement of Facts

The Morrells owned a home at 2324 Clover Lane, Northfield, Illinois, which [**3] was partially destroyed by fire on December 15, 1990, when a candle ignited a wreath. The Morrells had previously arranged to have their home remodeled, and notified the contractor of the fire damage.

The Morrell's insurance company authorized them to lease temporary housing because repairs were estimated to take several months to complete. Aided by their attorney, the Morrells entered into a written lease with Generes for the rental of a home located at 1829 Happ Road, Northbrook, Illinois. Generes, a practicing attorney for almost twenty years, resided next door. The lease covered a six-month period from December 18, 1990, through June 17, 1991, with rent of $ 2200 payable on the 18th of each month. The lease contained a clause which provided that the time of each payment was of the essence. The lease also contained a holdover provision in the event that the tenants remained in possession beyond the agreement's term. n1

----------Footnotes----------

n1 The holdover provision provided that: If the Lessee retains possession of the Premises or any part thereof after the termination of the term by lapse or otherwise, then the Lessor may at Lessor's option within thirty days after the termination of the term serve written notice upon Lessee that such holding over constitutes either (a) renewal of this lease for one year, and from year to year

thereafter at double the rent specified under Section 1 for such period, or (b) creation of a month to month tenancy, upon the terms of this lease except at double the monthly rent specified under Section 1, or (c) creation of a tenancy at sufferance, at a rental of [blank] dollars per day for the time Lessee remains in possession. If no such written notice is served then a tenancy at sufferance with rental as stated at (c) shall have been created. Lessee shall also pay to Lessor all damages sustained by Lessor resulting from retention of possession by Lessee.

----------End Footnotes---------- [**4]

After delivering their first check for $ 6600 to Generes, comprised of the first month's rent and a $ 4400 security deposit, the Morrells [*1015] moved into the rental premises on December 18, 1990. All six payments from December 18, 1990 through May 19, 1991 were made on time and delivered to Generes' door by either Mrs. Morrell or her children. However, the Morrells did not vacate the rental property by June 17, 1991, in accordance with the written lease. Before the expiration of the lease, the Morrells testified that they learned that they would be unable to return to their home in June of 1991 as planned because construction of their home was behind schedule. The Morrells testified that they reached an oral agreement with Generes to extend the lease for two months when construction of their home was to be completed. According to the Morrells, the oral lease stemmed from a phone conversation made by Mr. Morrell to Generes' home at an uncertain date in July of 1991. The Morrells subsequently negotiated with their insurance company for reimbursement of their living expenses at the rental property for two additional months.

Nonetheless, the Morrells did not pay July rent, due on June 18, [**5] 1991, until July 6, 1991. In her testimony Mrs. Morrell stated that the payment was late because of an out-of-town trip and was "a simple oversight." The Morrells paid their August rent on time on July 21, 1991, and vacated the premises on or about August 17, 1991. On several occasions thereafter the Morrells contacted Generes about the return of their security deposit. According to the Morrells, Generes informed them that the return

of the deposit would be complicated by the fact that he had filed for bankruptcy protection.

Generes denied that he entered into an oral agreement with the Morrells. Generes testified that he wrote and delivered a letter to the Morrells on July 11, 1993, in which he notified the Morrells that Generes had elected to treat the lease as a holdover. Generes testified that he delivered the letter by tossing it on the floor of the rental property and then returning home. Although Generes attached a copy of the letter in question to his complaint, the Morrells deny ever receiving the notice. The notice informed the Morrells that Generes was holding them for a renewal term of one year, but that he would waive doubling the rent.

Generes subsequently claimed that [**6] the Morrells were liable to Generes both for unpaid rent and late fees in excess of $ 20,000 for the ten-month period after the Morrells vacated the premises. Generes further alleged that the Morrells physically damaged the property by an amount in excess of $ 8000 during the eight months they occupied the property. The property damage included $ 3000 in labor for repainting the interior of the home and the replacement of a bathroom fan and fir tree. However, Generes admitted that he did not inform the Morrells of the property damage prior to instituting the bankruptcy lawsuit, and he subsequently dismissed the property damage claims with prejudice within two weeks of the trial date. Moreover, in his testimony Generes admitted that he also failed to raise the issue of the holdover with the Morrells until he filed suit, and that he never attempted to collect the overdue rent and late fees which allegedly accrued after the Morrells left the rental property.

II. Procedural History

On August 14, 1991, several days before the Morrells moved from the rental property, Generes filed a voluntary petition for bankruptcy under Chapter 11. On September 6, 1991, Generes scheduled the Morrell's [**7] claim as disputed and described it as a holdover tenancy. Shortly thereafter, on September 21, 1992, the Morrells filed a claim in Bankruptcy Court for the return of their security deposit in the amount of $ 4400, which was scheduled as a disputed claim. Generes contested the claim and counterclaimed on the basis of the letter he allegedly wrote to the Morrells. In his complaint, Generes alleged that: 1) a holdover

tenancy had been created when the Morrells stayed an additional two months at the property; 2) the Morrells owed him a monthly late fee for unpaid rent during the purported holdover tenancy for the ten months after they left the property; and (3) that the Morrells had done over $ 8000 of physical damage to the property.

After a hearing on June 30, 1993, during which each of the parties and additional witnesses [*1016] testified, the Bankruptcy Court found that Generes had not in fact written or delivered the letter purporting to create the holdover tenancy, and that the parties had instead orally agreed to extend the lease for two months. Consequently, the Bankruptcy Court entered an order on July 15, 1993, granting the Morrell's their security deposit and denying Generes' counterclaim [**8] for rent and fees due to an alleged holdover tenancy. The Court stipulated that each party was to bear his own costs of litigation.

On July 26, 1993, Generes filed a motion for a new trial, which was stricken two days later for Generes' failure to notice the motion for a date certain pursuant to Local Rule 12. The order was entered on the court's docket on August 12, 1993, whereupon Generes renoticed and filed the same motion for a new trial for hearing on August 16, 1993. That same day the trial court denied the motion for a new trial. Generes filed a notice of appeal with the Clerk of the Bankruptcy Court in regard to the holdover tenancy matter on August 19, 1993. The Bankruptcy Court ordered the judgment stayed on appeal on August 23, 1993, and approved the Morrell's Supersedeas Bond in the amount of $ 5120.00.

On August 30, 1993, the Morrells cross-appealed the Bankruptcy Court's decision to deny them costs and attorney's fees. The basis of the Morrell's appeal is that the court below abused its discretion inasmuch as it found that Generes had "perjured himself in asserting his claims against the Morrells."

III. Bankruptcy Judge's Opinion

The Bankruptcy Court observed that [**9] the case turned on the credibility of the witnesses:

This case turns on the pure issue of credibility. If I believe Mr. Generes, that the [holdover] notice was delivered, or, to the extent that the notice was not delivered, that he has elected, pursuant to common law, to treat the occupancy by the Morrells as a hold-over situation and treat them as hold-over tenants, then he is indeed

entitled to what he prays for . . . If I believe the Morrells, that there was an oral extension agreement by which Mr. Generes agreed to extend the original six-month term of the lease for an additional two months for the same rental, then Mr. Generes, of course, is not entitled to that additional sum and . . . [the Morrells] are entitled to the return of the security deposit.

The Court ultimately found, based on the testimony of all the witnesses, that there was an agreement between the parties whereby the original period of the lease was extended for two months. The Court also found that Generes never delivered the alleged holdover notice as he claimed in his sworn testimony. The Court stated: "I just don't think that the delivery of the notice was reasonable under the circumstances. Nor, in [**10] fact, do I believe the notice was delivered at all or prepared at all."

DISCUSSION

This Court has jurisdiction over both appeals pursuant to 28 U.S.C. @ 158 because the Bankruptcy Court's order entered on the docket July 15, 1993, was a final judgement under both 28 U.S.C. @ 158 and Rule 8001(a) of the Federal Rules of Bankruptcy Procedure. Under 28 U.S.C. @ 158(a) federal district courts have appellate jurisdiction "from final judgments, orders and decrees" of the bankruptcy courts.

Standard for Review As a preliminary matter, this Court finds that the proceedings before the bankruptcy court were a "core" proceeding under 28 U.S.C. @ 157. A proceeding is "core" if it invokes a substantive right provided by Title 11. See Barnett v. Stern, 909 F.2d 973, 981 (7th Cir. 1990).

A bankruptcy judge's factual findings are entitled to substantial deference in this Court, and will not be set aside unless they are clearly erroneous. Fed. R. Bankr. P. Rule 7052. Rule 7052 of Fed. R. Bankr. P. incorporates by reference [**11] Rule 52 of the Fed. R. Civ. P., which provides in part: "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A finding is clearly erroneous when "although there is [*1017] evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. Bessemer City, 470 U.S. 564, 84 L. Ed.

2d 518, 105 S. Ct. 1504 (1985). Questions of law require a de novo review. Park Terrace Townhouses v. Wilds, 852 F.2d 1019 (7th Cir. 1988). The court must also determine whether the trial court applied the proper legal standard to the facts.

Denial of Generes' Motion for New Trial

Generes claims that the trial court erred in striking his motion for a new trial for failure to comply with Local Rule 12, which requires that the motion include a date of presentment. Local Rule 12(i), provides that:

Denial of Motion for Failure to Prosecute. Where the moving [**12] party, or if the party is represented by counsel, counsel for the moving party, delivers a motion for which no date of presentment is set and fails to serve notice of a date of presentment within ten days of delivering the copy of the motion to the court as provided by section E of this Rule, the Court may on its own initiative deny the motion.

Generes contends that on July 28, 1993, two days after the motion was filed and prior to the ten-day period allowed under Rule 12(i) to notice a date for hearing the motion, the court improperly entered an order striking the motion. However, as the Morrells correctly point out, even though the court's order was dated two days after the motion was filed, the order was not entered on the docket until seventeen days later--on August 12, 1993. Thus, Generes had more than the requisite ten days to comply with Local Rule 12(i) and set a hearing date before the order was finalized, which he declined to do. Even assuming that the court entered its order prematurely, Generes was not deprived of the opportunity to comply with the requirements of Rule 12. We therefore conclude that the trial court did not err in denying Generes' motion for a new trial. [**13] Nor did the trial court err in insisting that the motion for a new trial, when renoticed for a later date, be considered as a Fed. R. Civ. P. Rule 60 motion. Rule 60 appropriately prescribes the procedure for correcting or vacating orders or other parts of the record which contain clerical mistakes. Clearly the trial court acted within its discretion in denying the Generes' Rule 60 motion when, in its own judgment, either no mistake was made or its effect was inconsequential.

Holdover Tenancy v. Tenancy at Sufferance We first address the issue of whether the trial court's finding that the parties had a

valid two-month oral lease was clearly erroneous. Generes claims that the Morrells were holdover tenants bound by the terms of a letter which he allegedly delivered to the Morrells informing them of his election to hold them over for one year. Even in the absence of of a written notice, however, Generes contends that no valid and enforceable oral contract was created to overcome the presumption at law that a holdover tenancy existed. Generes reasons that under the common law the Morrells would thus be obligated to pay rent for an additional six-month term. The Morrells argue that [**14] they were tenants at sufferance based on an alleged oral agreement which modified the original written lease, extending the lease for two additional months. As tenants at sufferance, the Morrells contend that they were entitled to terminate the lease at will and were therefore not obligated to pay rent after vacating the rental property.

The failure of a tenant to vacate the premises following the expiration of a lease term may create a tenancy at sufferance or a holdover tenancy. Bransky v. Schmidt Motor Sales, Inc., 222 Ill. App. 3d 1056, 584 N.E.2d 892, 894, 165 Ill. Dec. 458 (Ill. App. Ct. 1991). A tenant at sufferance is "one [who] comes into possession of property by lawful title, but wrongfully holds over after the termination of his interest." Bransky at 894 (quoting Black's Law Dictionary 1466 (6th ed. 1990)). The right of a tenant at sufferance is limited to possession only, which the landlord may terminate at any time, without notice. Bransky at 894.

Generes correctly asserts that if a lessee holds over after the expiration of the [*1018] term of the lease, only the lessor, not the lessee, has the right to decide [**15] whether to treat the lessee as a holdover tenant. In the absence of evidence to the contrary, a presumption arises that there is a holding over under the terms of the original lease. Bransky at 895 (citing Bellows v. Ziv, 38 Ill. App. 2d 342, 187 N.E.2d 265 (1962). However, in this case, the court below determined that an oral lease was created, overcoming the presumption that a holdover tenancy was created. The rules relating to holdover tenancies do not apply where there is a contrary mutual understanding concerning the tenant's continued occupancy of the premises after expiration of the term of the lease. Cottrell v. Gerson, 296 Ill. App. 412, 16 N.E.2d 529 (Ill. 1939). The burden of establishing such an agreement is on the

tenant, and the presumption applies unless a preponderance of the evidence establishes a contrary agreement. Id. We next determine whether the Morrells sustained their burden of establishing the existence of an oral agreement. Generes argues that no valid and enforceable oral contract was created.

It is well established that the parties to a written contract may [**16] alter or modify its terms by a subsequent oral agreement. South Shore Amusements, Inc. v. Supersport Auto Racing Asso., 136 Ill. App. 3d 284, 483 N.E.2d 337, 340, 91 Ill. Dec. 55 (Ill. App. Ct. 1985). Whether an oral contract exists, its terms and conditions, and the intent of the parties are questions of fact to be determined by the trier-of-fact. South Shore at 340. The question of whether a binding contract exists is determined by the intent of the parties when the document in question is executed. Evans, Inc. v. Tiffany & Co., 416 F. Supp. 224, 238 (N.D. Ill. 1976). In measuring intent, all relevant circumstances surrounding the negotiation and execution of the agreement should be considered, as well as the language and terms of the agreement itself.

The bankruptcy court clearly held that there was a valid and enforceable oral lease. The court found a valid offer, acceptance and consideration; the terms of the agreement were definite, and the surrounding circumstances indicated that the parties intended to be contractually bound. Generes admitted in his testimony that, aside from the [**17] notice which the court determined he fabricated, he never discussed the holdover tenancy with the Morrells.

Even if no definite term was decided upon, the result is the same. An agreement that does not state or contain a definite time for termination is terminable at the will of either party. Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc., 130 Ill. App. 3d 798, 474 N.E.2d 1245, 1249, 86 Ill. Dec. 48 (Ill. App. Ct. 1985). Thus, even assuming that the lease term was indefinite, the Morrells acted within their contractual rights in electing to terminate the oral agreement with Generes at their will.

Generes next argues that under the parol evidence rule "oral testimony to vary the terms of the written holdover lease is excluded from consideration by the court." Generes' application of the parol evidence rule to the facts of this case is misguided. The parol evidence rule bars evidence of prior or contemporaneous

oral agreements which alter the scope or meaning of a written instrument. The only written instrument at issue here is the original written lease. Oral testimony concerning the extension of the lease was not [**18] prior to or contemporaneous with the document's creation, but occurred later, in the Spring of 1991. If Generes refers to the letter which purportedly established a holdover tenancy, the court below found that it had been fabricated.

Prohibition of Closing Argument

Generes next alleges that the trial court abused its discretion in denying him the right to closing argument. The record reflects that the trial judge instructed Generes to sit down and keep quiet immediately prior to making his closing argument.

While the Federal Rules of Civil Procedure and the Federal Rules of Evidence address the order and presentation of closing argument, neither addresses the outright denial of closing argument. It is well-settled that a criminal defendant has a Sixth Amendment right to present a closing argument in a [*1019] bench or jury trial. Herring v. New York, 422 U.S. 853, 45 L. Ed. 2d 593, 95 S. Ct. 2550 (1975). It is less apparent whether a closing argument is required in civil cases.

Recently, the Illinois Court of Appeals noted that closing argument in a civil case is not a right, but a privilege. Korbelik v. Staschke, 232 Ill. App. 3d 114, 596 N.E.2d 805, 173 Ill. Dec. 181 (Ill. App. Ct. 1991). [**19] In Korbelik, the plaintiff in a malicious prosecution action appealed from a judgment in favor of the defendants, claiming that the trial court erred in not allowing plaintiff's counsel to make a closing argument. The judge instructed counsel that closing argument wasn't necessary and indicated that he wished to "save time." Id. at 808. When plaintiff's counsel requested the opportunity to summarize his case, the judge indicated that he was "pretty well aware of the testimony that has been given in this case." Id. at 808.

The appellate court noted that "Illinois follows those jurisdictions which hold that "oral argument in a civil proceeding tried before the court without a jury, is a privilege, not a right, which is accorded to the parties by the court in its discretion." Id. at 808. The appellate court held that the trial court did not abuse its discretion in refusing to permit plaintiff's attorney to make a closing argument. The court noted that the case was tried without a

jury; involved "a very short trial with an uncomplicated factual scenario"; and that the judge took extensive notes of the trial proceedings. Id.

In the instant case, we find no evidence [**20] that Generes was prejudiced by the trial judge's refusal to allow him to present a closing argument. The trial judge expressly stated that the case turned on the credibility of the parties. The trial judge did not find Generes' testimony to be credible, and we fail to discern how Generes could recover his credibility in a closing argument. Furthermore, we agree with the Morrells that Generes effectively made his closing argument in two post-judgment motions before the trial court. We therefore conclude that, even assuming that the trial judge erred in not allowing Generes to present a closing argument, the error was harmless.

Costs

The Morrells seek costs pursuant to Fed. R. Bankr. P. Rule 7054(b), which provides that "the court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides." n2 Seventh Circuit case law recognizes a rebuttable presumption that costs be awarded to the winning party. Popeil Brothers, Inc. v. Schick Electric, Inc., 516 F.2d 772 (7th Cir. 1975)

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n2 Fed. R. Civ. P. Rule 54(d), applicable in other federal litigation, provides: "Except when express provision therefore is made either in statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . ."

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - [**21]

The defendants in Popeil Brothers appealed the district court's denial of costs and attorney's fees pursuant to Rule 54(d) of the Federal Rules of Civil Procedure in a patent infringement action. In analyzing Rule 54(d), the Seventh Circuit discussed the awarding of costs in equity proceedings, noting that, prior to the promulgation of the Federal Rules of Civil Procedure, costs were considered a matter of discretion unless controlled by statute or rule of court. Id. at 774. The Popeil court stated that "the prevailing party is, however, prima facie entitled to costs, and it is incumbent on the unsuccessful party to show circumstances sufficient to

overcome the presumption." Id. at 774 (quoting In re Northern Indiana Oil Co., 192 F.2d 139, 142 (7th Cir. 1951)). "This principle must be . . . applied, unless the losing party can show that equity and good conscience require a different judgment." Id. at 774 (quoting Hodgman v. Atlantic Refining Co., 20 F.2d 949, 951 (D. Del. 1927)). The Seventh Circuit therefore interprets Rule 7054 to mean that a presumption [**22] is created that the prevailing party is entitled to costs, which the losing party must overcome.

Thus, under Popeil, Generes must prove "circumstances sufficient to overcome the presumption" that costs be awarded to the Morrells as the prevailing party. The [*1020] Morrells point to Generes' bad faith in conducting himself throughout the litigation, both as a party to the proceedings and as an attorney, in support of their request for costs. The Morrells allege that Generes has engaged in "punitive litigation tactics" which have resulted in their suffering "a financial bloodbath at the hands of Generes and his meritless claims.'" First, the Morrells point out that the trial court ultimately determined that Generes, "an attorney and officer of the court," lied about the creation and delivery of a holdover tenancy and fabricated the letter which he attached to his brief in support of that holdover tenancy. n3 Second, the Morrells claim that they were forced to hire legal counsel and incur prohibitive legal fees in order to defend themselves against Generes' meritless claims with respect to the holdover and property damages. The Morrell's assert that the claim for over $ 8000 in property [**23] damages during an eight-month lease was so groundless that Generes dismissed it on his own motion just two weeks before the trial. Third, in the Morrell's view, Generes has taken advantage of his status as an attorney in representing himself pro se by prolonging the litigation at their expense without incurring any legal debts. Lastly, the Morrells charge that Generes has disingenuously attempted to establish in his briefs that the Morrells committed arson and insurance fraud.

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n3 The trial court expressly stated: "I just don't think that the delivery of the notice was reasonable under the circumstances.

Nor, in fact, do I believe the notice was delivered at all or prepared at all."

----------End Footnotes----------

Generes failed to overcome the presumption that the Morrells, as prevailing parties, are entitled to costs. We therefore hold that the trial court abused its discretion in failing to award costs to the Morrells.

Attorney's Fees

The Morrells next contend that the trial court abused its discretion in failing to award them attorney's fees. [**24] a) Court's Inherent Powers

The Morrells request attorney's fees pursuant to this court's general equitable powers, claiming that they should be awarded attorney's fees based on the "bad faith" exception to the American Rule. The Morrells contend that the same factors which compel the award of costs demand the assessment of attorney's fees against Generes.

There is no provision in the Bankruptcy Act or Rules which expressly authorizes an award of attorney's fees based on the facts of the present case. Although early decisions consistently denied the grant of such awards, it is now well-settled that a bankruptcy court may assess counsel fees against a party which has acted contemptuously or in bad faith. See Hammett v. Hammett, 28 Bankr. 1012, 1015 (E. D. Penn. 1983). Under a principle known as the American Rule, each party to a lawsuit ordinarily bears its own attorney's fees unless a statute or decisional authority provides otherwise. See Alyeska Pipeline and Service Co. v. Wilderness Society, 421 U.S. 240, 247, 258-59, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975); Hall v. Cole, 412 U.S. 1, 5, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973). [**25] One of the exceptions to the American Rule authorizes a federal court to award counsel fees to a successful party "when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Hall at 5. The authority for this exception rests upon the general equity powers of the federal courts. Id.

The Supreme Court in Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991), recently reaffirmed a district court's inherent power to assess attorney's fees as sanctions for bad-faith conduct in litigation. The Court reasoned that the

power to assess sanctions for bad-faith litigation was one of the inherent or implied powers which courts must necessarily possess "to manage their affairs and govern their affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 2132. The power to assess attorney's fees, like other inherent powers possessed by the district court, is based on the need to control court proceedings and the necessity of protecting the exercise of judicial authority in [*1021] connection with those proceedings. Id. These principles are equally [**26] applicable to the bankruptcy court, since a bankruptcy proceeding is an equitable proceeding. See Bank of Marin v. England, 385 U.S. 99, 103, 17 L. Ed. 2d 197, 87 S. Ct. 274 (1966).

The Chambers Court expressly stated that the inherent power of a court can be invoked even if other procedural rules exist to sanction the same conduct:

> There is nothing in [28 U.S.C. @ 1927], Rule 11, or other Federal Rules of Civil Procedure authorizing attorney's fees as a sanction, or in this Court's decisions interpreting those other sanctioning mechanisms, that warrants a conclusion that, taken alone or together, the other mechanisms displace courts' inherent power to impose attorney's fees as a sanction for bad-faith conduct. Although a court ordinarily should rely on such rules when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court may safely rely on its inherent power if, in its informed discretion, neither the statutes nor the rules are up to task.

Id. at 2126.

Since the Court expressed a preference for sanctioning [**27] conduct under rules and statutes, we ordinarily consider any such authority before considering the court's inherent power to award attorney's fees. However, in cases where a statute or rule may not be "up to task" in addressing the full range of conduct at issue, a court may rely on its inherent power to sanction that conduct. Id. The Chambers Court recognized that sanctioning statutes and rules may reach "only certain individuals or conduct," whereas "the inherent power extends to a full range of litigation abuses." Id. The Court concluded that, "at the very least, the inherent power must continue to exist to fill in the interstices." Id. at 2134. Therefore, where rules and statutes fail to "fill in the interstices" of the full

range of a party's conduct, a court may invoke its inherent powers to do so:

In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which [**28] is contrary to the aim of the rules themselves.

Id. at 2136.

Therefore, in the instant case, even if we can demonstrate that Generes' conduct is sanctionable under other applicable statutes or rules, we may invoke our inherent power if the full range of his bad-faith conduct is beyond the reach of such authority. For example, in Chambers the defendant's conduct relating to the filing of frivolous and false pleadings was sanctionable under Rule 11, which governs papers filed with a court. Id. However, the Court noted that the defendant also "attempted, by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance," and such acts could not be reached by Rule 11. Id.

Similarly, the Court determined that 28 U.S.C. @ 1927 is not broad enough to reach "acts which degrade the judicial system," including "attempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court." Id. at 2130. Here, notwithstanding whether Generes has violated Rule 11 for filing "false and frivolous pleadings," since much of his alleged bad-faith conduct is beyond the reach of the [**29] rules, we are justified in relying on our inherent power to sanction him if warranted.

In the instant case the record reflects that Generes' conduct rivals that of the defendant in Chambers, who not only filed false and frivolous pleadings, but committed perjury and harassed his opponents. Furthermore, Generes used these proceedings as a vehicle for making serious and scandalous allegations which are totally bereft of any basis in fact or law, including claims that the Morrells committed arson and insurance fraud, and objected to his reorganization plan in bad faith. Generes also improperly disclosed the contents of settlement negotiations and accused the trial judge of improper ex [*1022] parte communications with

opposing counsel without any sustantiation whatsoever. Moreover, the briefs which Generes submitted to this court are poorly organized, replete with typographical and grammatical errors, and sorely lacking in relevant legal authority. The fact that Generes is representing himself pro se in this matter and is not a member of the federal trial bar does not alter our decision. Generes has practiced law for nearly twenty years and is not a stranger to the law or to the legal system. [**30] While we regard an award of fees against an opposing party to be a severe measure which this Court reserves for exceptional circumstance, we believe such a sanction is warranted here.

Although we have determined that the the full range of Generes' conduct is beyond the reach of Rule 11, for the sake of argument we will consider all applicable statutes and rules in addition to invoking this court's inherent power to award attorney's fees. We first note that the fact that the Morrells did not request attorney's fees under any statute or rule does not preclude this court from exercising its judgment sua sponte that Generes violated a given statute or rule, including Rule 11. Accordingly, under the facts of this case we deem it appropriate to consider awarding attorney's fees pursuant to Rule 11 of the Fed. R. Civ. P. (or its equivalent, Fed. R. Bank P. Rule 9011), and 28 U.S.C. sec. 1927.

b) Sanctions under Rule 11/Bankruptcy Rule 9011 Attorney's fees are expressly authorized by Bankruptcy Rule 9011, which tracks the language of Federal Rule of Civil Procedure 11. Bankruptcy Rule 9011, like Fed. R. Civ. P. 11, permits the district court to award [**31] sanctions for attorneys who file documents that are not "well grounded in fact . . . [or] warranted by existing law. . . ." Rule 9011 provides:

The signature of an attorney or a party constitutes a certificate that [the signer] has read the document; that to the best of [the signer's] knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation . . . If a document is signed in violation of this rule, the court on motion or its own initiative, shall shall impose on the person who signed it, the represented party, or both, an appropriate

sanction, which may include an order to pay . . . the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.
Rule 9011(a).

Under Rule 11, attorneys are required to make a reasonable inquiry to determine whether pleadings or other documents they sign are well-grounded in fact and warranted by existing [**32] law. If the district court concludes that the motion, pleading, or other document was not well-grounded in fact or warranted by the existing law, or was meant to harass, then the court must impose a sanction. Fed. R. Civ. P. 11; Insurance Benefit Administrators, Inc. v. Martin, 871 F.2d 1354, 1357 (7th Cir. 1989). We note, however, that Rule 11 does not require a finding of bad faith. Chambers at 2134; National Wrecking Co. v. International Bhd. of Teamsters, Local 731, 990 F.2d 957, 963 (7th Cir. 1993). The standard for imposing sanctions under Rule 11 is an objective determination of whether a party's actions were reasonable under the circumstances. Brown v. Federation of State Med. Bds., 830 F.2d 1429, 1435 (7th Cir. 1987).

There are two grounds for sanctions in Rule 11: the "frivolousness clause" and the "improper purpose clause." Brown at 1435. The frivolousness clause of Rule 11 has two subparts: whether the party or attorney made a reasonable inquiry into the facts, and whether the party or attorney made a reasonable inquiry into the law. Id. A violation of either subpart [**33] of the frivolousness clause constitutes a violation of Rule 11. Id.

To determine whether an attorney has made a reasonable inquiry into the facts of a case, we must consider: 1) whether the signer of the documents had sufficient [*1023] time for investigation; (2) the extent to which the attorney had to rely on his client for the factual foundation underlying the pleading, motion, or other paper; (3) whether the case was accepted from another attorney; (4) the complexity of the facts and the attorney's ability to do a sufficient prefiling investigation; and (5) whether discovery would have been beneficial to the development of the underlying facts. Brown at 1435. To determine whether the attorney in question made a reasonable inquiry into the law, the district court should consider: (1) the amount of time the attorney had to prepare the document and research the relevant law; (2) whether the document contained

a plausible view of the law; (3) the complexity of the legal questions involved; and (4) whether the document was a good faith effort to extend or modify the law. Id.

We first find that Generes has not made a reasonable inquiry into the facts. Many of the allegations made [**34] by Generes in his briefs, including claims that the Morrells committed arson and insurance fraud, and objected to his reorganization plan in bad faith, are so plainly contentious and irrelevant that they do not lend themselves to a meaningful investigation into the facts. For instance, Generes devoted considerable time perfecting his argument that the Morrells burned down their own home: "in light of [the Morrell's testimony, I have [since] concluded that the Morrells deliberately set their home on fire in order to have their insurance pay for what they wanted, but could not afford, themselves."

We agree with the Morrells that "Generes fills his 33 pages with equal parts irrelevance, innuendo, conjecture and other unsupported legal and factual assertions." In numerous instances Generes resorts to accusations and name-calling. In response to Mr. Morrell's trial testimony, Generes comments that "YOU CAN JUST SEE HIS NOSE GROWING as he tell [sic] this big one to the court," and later claims that "the alleged oral lease is a totally preposterous lie!" Moreover, Generes presented thirteen issues in his appellate brief which were presented in an unorganized and incomprehensible fashion. [**35]

We further conclude that Generes has not made a reasonable inquiry into the law, which is undoubtedly a consequence of his reliance on unsupported facts to begin with. Generes' briefs contain numerous arguments which are either unsupported or improperly supported by case law outside the Seventh Circuit when case law exists within this circuit.

The other prong of Rule 11, the "improper purpose clause," provides that a motion, pleading, or other document may not be interposed for purposes of delay, harassment, or increasing the costs of litigation. Brown at 1435. However, since we have found that Generes violated the frivolousness prong of Rule 11, it is unnecessary to address whether Generes violated the "improper purpose clause." Similarly, we decline to consider whether attorney's fees may also be awarded under 28 U.S.C. @ 1927, which

provides that "any attorney . . . who so multiplies the proceedings in any case unreasonably or vexatiously may be required by the court to satisfy personally the excess costs incurred because of such conduct." Accordingly, we exercise our discretion in finding that that Generes violated Fed. R. Civ. P. 11 and [**36] Bank. R. 9011 by filing a frivolous brief. Alternatively, we rely on our inherent power to impose attorney's fees for Generes' bad faith conduct.

CONCLUSION

For the foregoing reasons, we reverse that part of the Bankruptcy Court's judgment that denied attorney's fees and costs to the defendants, and remand the case to the Bankruptcy Court to determine and impose attorney's fees and costs pursuant to Bankruptcy Rule 7054(b).

ENTER:

GEORGE M. MAROVICH

UNITED STATES DISTRICT JUDGE

DATED: March 10, 1994

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TASKER GENERES	)	91 B-177220
and DOROTHY GENERES,	)	Chapter 11
Joint Debtors.	)	
	)	
TASKER GENERES	)	Adv. No. 92A01283
	)	
Plaintiff,	)	
	)	
	)	
EDWARD L. MORRELL and	)	
PATRICIA MORRELL,	)	
	)	
Defendants,	)	

MINUTE ORDER (EOD AUG 19, 1993)

For the reasons stated in open court plaintiffs, motion for a new trial is denied.

David H. Coar
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TASKER GENERES and DOROTHY GENERES, Joint Debtors.	)	91 B-177220 Chapter 11
TASKER GENERES Plaintiff,	)	Adv. No. 92A01283
EDWARD L. MORRELL and PATRICIA MORRELL, Defendants,	)	

ORDER

IT IS HERBY ORDERED THAT The Plaintiff's (Pro se) Motion for a New Trial is Stricken for the Plaintiff's failure to Notice this Motion for a date certain pursuant to Local Rule 12.

Dated: July 28, 1993 ENTER

David H. Coar
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TASKER GENERES and DOROTHY GENERES,	)	91 B-177220 Chapter 11
Joint Debtors.	)	
TASKER GENERES	)	Adv. No. 92A01283
Plaintiff,	)	
EDWARD L. MORRELL and PATRICIA MORRELL, Defendants,	)	

MOTION FOR A NEW TRIAL

Plaintiff, TASKER GENERES, pro se moves, pursuant to Bankruptcy Rule 9023 and, by reference, Rule 59 of the Federal Rules of Civil Procedure for a new trial and to set aside the judgment in the above captioned case and additional time in which to file a legal memorandum, and in support of this motion states as follows:

1. On June 30, 1993, the above captioned matter went to trial.

2. On July 15, 1993, the Final Order of this Court was entered on the Docket which denied Plaintiff's objection to the claim filed by the defendants Edward and Patricia Morrell and denied Plaintiff's counterclaim.

3. The trial court erred in denying to plaintiff's counsel the right to make a closing argument. Under Illinois Law the right of counsel for all parties to make a closing argument is absolute, Vieceli v Cummings, 322 Ill.App. 559, 561, 54 N.E.2d 717(Ill App. 1st Dist, 1944). Further, at 561 the Viesceli court held: "The law is well settled that argument of counsel is a matter of right. Argument of a case is as much a part of the trial as the hearing of the evidence. A party to a civil suit has a right to be heard, either by himself or by counsel, not only in testimony, but in the argument of his case." In the case at bar, Plaintiff's counsel at the appropriate time rose and announced he would commence his closing argument. Then, because the trial court ordered plaintiff's counsel to sit down and not make his closing argument, the court committed error of constitutional proportions. Thus, the Court denied plaintiff's constitutional right of due process of law and to a fair trial under the Constitution of the State of Illinois, Article I, Section 2 and the United States Constitution Fifth and Fourteenth Amendments.

4. Alternatively, if the right to be heard in argument in a civil case is not an element of a "fair trial" inherent in American jurisprudence, then it is an abuse of discretion for the Trial Court to order plaintiff's counsel to sit down and not make his closing argument. Reasonable discretion does not comprehend deprivation of a party's right to present analysis of evidence and inferences claimed to be deductible therefrom to the trier of fact. Where the court is making a decision on the basis of contested versions of the facts heard in evidence and inferences made therefrom, it is clear from the Vieceli case that what is known in Illinois as a trial was ordered prematurely terminated before a complete trial was had. While the Trial Court clearly has the discretion to limited the argument of counsel, that discretion is abused when the Court employs a sort of differential calculus by taking the limit of argument time to zero. Such an extreme is obviously prejudicial not only to the parties but to the ordered system of justice. See Thompson v People of State of Illinois 144 Ill 378, 381, 32 N.E. 968 (Ill.S.Ct., 1893)

5. A new trial should be granted because the judgment was contrary to the evidence and internally inconsistent.

a.) The Trial Court correctly concluded that Plaintiff had a written lease with the defendants for the period 12/18/90 to 6/17/91 at a monthly rental rate of $2,200 and a security deposit of $4,400.

b) The Trial Court correctly concluded that as a matter of common law since the tenants remained in possession after the stated term of the lease had expired and no forcible detainer action was filed and the tenant tendered and the landlord accepted further rent that a hold over tenancy had been created.

c).It is entirely the landlord's decision whether there will be a holdover tenancy or an eviction. The tenant has no voice in the matter at all. Such a hold over tenancy is governed by the same written terms as the written lease under which the tenants entered the premises. The holding over does not renew or extend the lease but it creates a new tenancy from year to year. Bransky v Schmidt Motor Sales, Inc., 222 Ill. App.3d 1056, 1061(2nd Dist, 1991) The original written Morrell lease provided that a holdover tenancy would be for a term of one year. Furthermore, the standard of evidence necessary to support a finding of an alleged oral lease is by clear and convincing proof to overcome a holdover lease. It is not the ordinary burden of more likely than not.

d) Thus, the issue became whether the court had clear and convincing evidence that a new oral lease for a term of exactly two more months had instead been agreed to by the parties in derogation of the written holdover tenancy. As a matter of substantive law, oral testimony to vary the terms of the written holdover lease is excluded from consideration by the court by virtue of the parol evidence rule. The parol evidence rule is a matter of substantive contract law and cannot be waived. The parol evidence rule bars evidence of a prior or contemporaneous collateral agreement where the effect is to alter the scope and meaning of the written instrument. In other words, parol evidence is not admissible to establish a collateral agreement which varies, contradicts, or annuls the terms of an unambiguous written contract which is complete on its face. 20 Am Jur 2d, Evidence Section 1049. Hence parol evidence of an oral agreement prior to 6/18/91 to

show that the written hold over lease never was formed on 6/18/91 or that an oral lease for two months commenced on 6/18/91 is inadmissible evidence upon which the court based its judgment. However, the Morrell's testimony alleged the agreement for a new oral lease of two months duration occurred prior to 6/18/91. Hence the court erred in ruling in favor of Morrell's alleged oral lease.

6 A new trial should be granted because the judgment was contrary to the evidence and internally inconsistent.

a) According to the testimony at trial, the Morrells had the written lease reviewed by their attorney. The Morrells knew how to and insisted on having the written lease modified to specifically protect their right to have a dog on the premises and other non standard terms.

b) The Morrells wanted and received a written six month lease. They did not get, as the Court mistakenly concluded, a lease for "however long it took the Morrells to finish their house". This concept is absurd and defies the purpose of a six month written lease. The Court should not write a lease for the parties to which they never agreed. Morrells attorney in his opening statement stated that the lease was for as long as the Morrells wanted, but their was no evidence presented at trial for that term of lease.

c) Morrells' six (6) month lease at $2200 a month was $400 per month higher than the previous tenant's one year term monthly rental rate of $1800, or a 25% increase. Morrells' testified that they thought I should rent the house out for an extra two months at a even lower rate than my six month rate. Morrells paid no consideration as the prior tenants were required by Generes for an extra month's stay of $1800 dollars in addition to the regular months rent of $1800. In other word, the Ritoff's who were the prior tenants, paid in effect double rent to stay an extra month. Yet the Morrells would have the court believe that Generes wanted to make a gift to Morrells insurance carrier by charging no consideration to obtain an alleged new lease of only two months duration, when Generes would not make such a gift to his prior tenants who

did not have an insurance company reimbursing them for their expenses.

d) It defies economic sense. Generes were not described as friends or family of Morrells. Morrells testified that they believed Generes stiffed they for about a hundred dollars on a garage door repair just months before the alleged oral lease which Morrell now want the court to them as seeing Generes as someone they were so completely confident and trusting to do the right thing that it was very understandable for the Morrells not to put a new two month lease in writing which implausibly contained absolutely nothing extra for the shorter lease term and left Generes in a disadvantaged seasonal time at which to put the house on the market again. They certainly put the matter of the garage door in writing. It is conceivable that Generes would rent at $2200 a month if the Morrells were responsible for a years term. It in inconceivable otherwise. As experience landlords, themselves, Morrells realized that without some written evidence of a two month lease from June 18, 1991 to August 17, 1991, they would be hold over tenants, liable for a years rent. After all they stayed in possession of the premises without any written evidence to the contrary. They testified they had no evidence at all except their oral testimony that there was a oral lease. The oral lease is totally a preposterous and clearly disingenuous lie.

e) Morrells expect the Court to believe that Generes wanted to make that kind of gift to their insurance company who would have to reimburse them for this fire loss. The 7th Circuit School of Law and Economics would never buy that brand of law which presumes gifts to insurance companies. If this is the way the law works then soon banks will be out of business and commerce will come to an end. All a note holder would have to say is that we reached an oral agreement after we signed the note to extend the due date for five years or what ever time is convenient to the debtor. There will be no reason for written leases, notes, or contracts. Insurance companies will find their policies expanded to cover everything by people saying my wife called and they said OK and I called and they confirmed and "by the way we didn't have to pay any extra premium for the expanded coverage!" People may think that a

lawyer should be eaten by a dinosaur. People may not like landlords. Emotions should not let written contracts between experienced mature adults be turned into gifts from the disliked party to the favored party.

f) According to the testimony of the Morrell's, they own a summer home in Wisconsin which they regularly rent out. The Morrell's exactly schedule the date of their vacation time in their Wisconsin residence by the terms of their rental agreement with their tenants. Being experienced landlords, Morrell's knew full well how to protect themselves by putting lease agreements in writing. Morrells' testified that they feared Generes might not let them stay and that it was of vital importance in their lives. They knew Generes could see that their house was still uninhabitable. They knew that they had misjudged the amount of time it would take to repair their house. This left Morrells is an economic disadvantages position. Yet they want the court to believe Generes decided to make a gift to their insurance company.

g) This knowledge and their practice of using Mr. Morrell's employer's Autotype Inc's computer word processing equipment and company worktime to draw up letters to Generes regarding such a matter as a hundred dollar garage door roller repair impeaches their testimony. No one would believe that Morrells who were experience landlords and very knowledgeable of how to deal with hold overs at their Wisconsin summer home would not put a new two month lease in writing. Particularly one which was so favorable and advantageous as to be incredible that any one would believe it.

h) Further Mr. Morrell's legal writing abilities are well developed as exemplified by his pro se written objection to the Confirmation of Generes's first Plan of reorganization show. At trial Morrell's attorney testified that he did not prepare that writing for his client. Morrell's demonstrated also in the Objection filed, an ability to understand and employee Bankruptcy law in written argument. This legal sophisticate should be the last person in the world to have his attorney point an accusatory finger at Generes and charge

"fraud and extortion". Usually the one who yells that out is actually the guilty party.

i) Mr. Morrell stated in his Objection to Confirmation that he was unaware of the holdover claim against him. It was Mr. Morrell's testimony that he was unaware of the holdover claim until approximately September 21, 1992 when the Plaintiff filed the above caption adversary complaint. These statements were clearly false. Mr. Morrell admits that he received the Debtors' Bankruptcy Schedules which expressly listed the Morrell as a holdover lease. Those schedules were filed and served on September 6, 1991, a whole year before. In addition, Morrells failed to explain why they did not conduct an examination of the debtor as was their right to fully explore the nature of the objection to their claim under oath or if the Morrell's felt confused or uninformed of the nature of Generes Bankruptcy Schedules and their consequences for Morrell. Thus, the Court can only reasonably conclude that Morrells were clearly informed all along about the hold over tenancy.

j) In addition the Morrells noted the For Rent sign on the premises and could see that it continued to be unrented. They have failed to explain why given that Generes had notified them in several different ways of their hold over that they did not attempt to help rent the property themselves or settle this matter earlier other than the realization that their fire insurance carrier would have to reimburse them if they lost.

k) In addition, Morrells filing of their false objection to confirmation of my first plan of reorganization, when they knew I had debts due and payable which I was unable to pay of approximately $500,000, shows an intent to take unfair advantage of my vulnerable situation with intent to force Generes to give up on the Morrell matter in order to get the Generes plan of reorganization confirmed.

6. The judgment is against the manifest weight of the evidence.

a.) Generes testified that all his lease arrangement from the time that 1829 Happ had been rented had all been in writing. Generes employed only written agreements to protect himself.

b) In particular, he testified, that whenever the tenant had requested to stay on beyond the term of the lease, Generes had prepared a written letter covering the new period of occupancy. In particular, Generes, supplied the Court and opposing counsel with the attached Letter used in the case of Generes's prior tenant, Harris and Paula Rittoff, who were building a house across the street from 1829 Happ. On August 28, the letter granted another month of occupancy to September 30, 1990 at $1800 for the month. It was signed. In consideration for the grant of another month of occupancy, Ritoff's paid $1800 in addition to the $1800 rent. A true and correct copy is attached hereto as Exhibit "A".

c) Generes testified that he could tell the Morrell's place which was nearby was nowhere near ready for occupancy by the end of the Morrell lease term so that he did not advertise the place. Morrell's contractor also testified to the fact that the house was not ready for the Morrell's to move out on June 17, 1991. This family of six plus two full mother's- helpers patently could not reasonable move out to her parent's place for another term of at least several more months.

d) Morrell's knew that because they had misjudged the term of lease needed to complete their home that now they were at Generes' mercy as far as the cost and terms of further occupancy. The emotional as well as fiscal cost of moving to another temporary quarters would be substantial, the movers, a new rental furniture contract, getting dogs, kids, and maids adjusted to a new place and routine and possible a different village's children's programs, etc. clearly put Morrells in a position where any further occupancy would be only granted upon costly terms. A suite of hotel rooms would probably cost $600 dollars a night for them. No relative would want that crowd for several months let alone a week and what would be done with their long term household employees.

e) Mrs. Morrell testified that Dorothy Generes, the wife of Tasker Generes, had months before the end of the lease told Mrs. Morrell that the Generes's had had an enormous judgment entered against them in end of December 1990 that left us in perilous financial condition forcing us to consider filing bankruptcy. Under these circumstances, Morrell formed the conclusion that their best strategy was to hold over their occupancy and accept the risk that the house could be sublet when necessary.

f) Generes had told Morrells he didn't mind the six month term of the lease when they asked for it because it would allow the property to be rented during the prime rental market for such large houses. Most families need to be established well before school starts and absent a disaster, such as Morrell's fire, do not want to move except in the summer. Generes had just experienced with his prior tenant a gap in rental between the end of the Ritoff lease and the Morrells December occupancy due to the off season rental caused by Ritoff's extra time.

g) Morrell's realized that an August 17, 1991 termination date would put Generes in the position where it would be impossible for a family to rent and settle in for the school season. It takes time to repair, paint, and make a house ready for a new occupancy.

h) Morrell's either inferred from conversation with the former tenant Ritoff who lived across the street or bet correctly that I would not enforce a doubling of the rent but would accept the same rent when tendered on a hold over one year lease basis. Morrell figured I would be satisfied as long as I did not bear the risk of letting the place out at an in auspicious time in the rental market.

i) All the testimony was that Generes did not advertise the house until the Morrell removed at which time Generes put up a FOR RENT sign in the front yard and advertised in the newspaper. Had Morrell's given notice that they were moving as soon as August 17, 1991, Generes surely would have started advertising at least sixty days before their departure.

j) Furthermore it is remarkable that the rent for the month commencing 6/18/91 was not paid until 7/4/91 after GENERES gave the holdover notice dated 7/1/91 to Morrells. Had there been an oral lease as Morrells allege, the rent certainly would have been paid on or about 6/18/91, as in all the previous months Morrells paid the rent nearly on time. Morrells' concerns, confusion, doubts brought on by their hold over strategy led them to not pay the 6/18/91 rent until they had seen the holdover notice of July 1, 1991 that the rent remained the same, then they paid no doubt with a great sigh of relief. Clearly the $100 late payment fee was due and payable for this late payment.

See Morrells deposition page 9 and 10 attached hereto a exhibit "B" and imagine Generes saying "That is not problem, you can stay as long as you like. Two months is fine. Wonderful! This testimony is incredibly unbelievable self serving testimony that defies economic common sense for both parties. Repeating it at trial does not make it any more credible.

k) The Morrells would have the court believe that when it came time to ask for an additional two months occupancy that Morrells trusted Generes completely and considered him like a saint. Yet Morrells testified that they had just accused Generes prior to the alleged new oral lease to be a nasty overreaching guy mistreating them and stiffing them on a garage repair which drove them to write a nasty letter to Generes. Generes testified that they and their four little kids caused extensive damage of $8000 and they said zero damage, but nevertheless Morrell testimony noted there were repair that Generes had to make due to the trike racing into the drywall, etc.

It is against the manifest weight of the evidence that there was any oral lease which was described by Morrells counsel in his opening statement as a term for however long Morrells needed to finish their house remodeling. Nor a lease for only two months as the Morrells would have the court believe. The inconsistency between counsel and clients is amazing. The Court was wrong to conclude that any version of the facts made any sense given the inconsistencies in the story related above. The Court's conclusion that the

Lease was for the length of time needed to repair Morrells house is not supported by the evidence. Based on this conflicting testimony any alleged oral agreement is unenforceable because of its indefiniteness and lack of consideration. See Demos v National Bank of Greece (First Dist, 1991), 209 Ill. App.3d 655, 661.

7.Morrells' attorney introduced error by his misconduct and ad hominem arguments.

a) Morrells' attorney told the Court in his opening argument that the burden of proof was upon the Plaintiff, that Plaintiff could not meet that burden, and that Defendant had no burden of proof. This is error Defendant clearly had the burden of proof that an oral lease had been formed. It is an affirmative defense which was not properly plead. However, that does not excuse, Morrells burden of proof.

b) Likewise, Defendant's attorney advised the court in opening that "Generes never discussed the hold over tenancy with Morrell and Morrell never acknowledged its existence" was false as both Generes's deposition showed and Generes's trial testimony showed and Generes's bankruptcy schedule filing showed. Because no closing argument was permitted, Generes's attorney was not able to bring these facts to the court's attention as he intended to do.

c) If the Defendant's defense is that Generes has committed a fraud by falsely stating that no oral lease occurred as seems to be Defendant's attorney's accusation. He has failed to properly plead it as an affirmative defense and further has not produced sufficient evidence to overcome the presumption that all men are honest, and that, therefore, where fraud is charged, it must affirmatively be proved by clear and convincing testimony, Jaworski v Sujewics (1929), 334 Ill 19, 165 NE 147.

Clearly by the exercise of ordinary prudence, Morrell, had ample opportunity to evidence an alleged oral lease by some timely writing documentation as was his habit with even minor matters. However as both Mr. and Mrs. Morrell testified they did not have any writing documentation at all, not even a note to his

secretary, or an entry in his work log. There was no supporting testimony whatsoever by anyone else.

From Morrells testimony, they felt the need for at least each other to independently confirm the "alleged" oral lease on the telephone. It is strange for a spouse who believes that a matter needs confirmation to utilize such an "unbiased and independent" witness as their own spouse as a method of confirmation of a vital contract with self recognized importance to their financial well being by both of them. Particularly for mature adults experienced in business matters and leasing who testified that they used their attorney to review the written lease for the very premises that now they did not need to even phone that attorney to at least advise about the prudence of an oral agreement at this recognized vital juncture and who could also serve as a witness of its discussion by them at least. This is a preposterous flaw in their evidence destructive of their case..

Even the contractor who appeared did not testify that he had a conversation with Mr. or Mrs. Morrell where Morrell told him that Generes had granted Morrell a extra two months to get the house done. If that were the fact, it seems strange that the contractor was not asked to testify to it.

People would be justified in concluding that neither Mrs. nor Mr. Morrell ever told their contractor remodeling their house that they had a confirmed lease agreement for an additional two months so please get the house done in time. A failure to communicate such an important fact to the contractor is inconceivable unless there was no such fact. Morrells therefore have been impeached by their own witness. His silence on such a key point shows their fraud on the court in a glaring light.

The contractor's testimony and his failure to testify as expected if there was an additional two months lease agreement is devastating to the Morrells' case. Had Generes's attorney had an opportunity to make a closing argument this set of facts would have been brought explicitly to the attention of the trier of fact.

The Court should ask what was the purpose of this witness? This was to be the big gun to blow Generes's case away with "independent" testimony confirming the existence of an oral lease. Generes was suppose to believe this guy was in their pocket and be intimidated into accepting their settlement offer of $4400 before trial. Generes called their bluff. Probably that's why their attorney took to the tack of asking mind numbing repetitious questions and wondering all of the course, and way outside of the relevant, changing his order of witnesses, etc. and lunching an ad hominem attack. It should have been obvious that their canon instead of blowing Generes out of the water, did not just backfire, but turned around an unloaded into the Morrells and most embarrassingly into their attorney, exposing all. The contractor's testimony on the existence of the oral lease was never asked for and wasn't given because the witness wasn't apparently in their pocket after all. Bad bluff, but, insurance carrier's attorney's win enough of them.

Sadly counsel for Generes was not able to highlight this for the trier of fact because the court refused to hear Mr. Sandack due to the tiresome longwinded mind-numbing tactics of opposing counsel who forced the proceeding past the time the train would leave if argument were allowed.

8. Defendant's pleadings admit the essential allegation of the plaintiff's case and fail to plead any affirmative defense. No affirmative defense is separately set forth and so denominated in the answer filed to Plaintiff's complaint. In particular, no affirmative defense of an oral lease has been properly pleaded.

a) Rule 9(c) of the Rules of Civil Procedure for the United States District Courts provides:
"In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

b) Paragraph 23 of Count II of the Generes Complaint alleges that Generes has fulfilled all of his obligations under the Lease.

Morrell answered paragraph 23 with only a denial. This operates under Rule 9(c) as a judicial admission by Morrell that Generes fulfilled all of his obligation under the Lease.

c) Furthermore, the denial by Morrell of paragraph 12 of the complaint which states: "Generes had no right to double rent during the holdover because the Morrells did not agree to such a rental rate when the parties orally extended the lease on a month-to-month basis." By implication does not deny that the holdover lease was for a period of one year on a month to month basis for the payment of rent. It is a negative pregnant pleading. This operates as a judicial admission of a holdover lease for the period of one year. This impeaches and should bar any attempt to show a shorter term of lease.

d) In paragraph 24, Morrell denied that any of their lease payments were late. Nevertheless during discovery, their check for the payment for the period beginning June 18, 1991 was plainly and admittedly paid late on July 4, 1991. Thus, the pleading contain a blatant falsehood. Nothing should be believed of what they testify. Thus, the Morrells owe a late fee and the Court was in error not to award a late fee.

Wherefore, Generes prays that the Court set aside the judgment and grant the motion for a new trial.

_____

Tasker O. de Generes

EXHIBIT "A"

Tasker O Generes
1845 Happ Road
Northbrook, Il 60062-5643
(708) 564-8944

Paula and Harris Rittoff
1829 Happ Road
Northbrook, IL 60062-5643

Dear Paula and Harris:

You requested an extension of the term of your present lease. Please sign and return one copy of this lease rider to the lease for 1829 Happ Road to me.

This lease rider incorporates by reference each and every provision of the original lease between the undersigned parties for the residence located at 1829 Happ Road, Northbrook, Illinois

Whereas, Lessee desires to continue occupancy to September 30, 1990. The parties by their signatures hereto express their agreement to the following modification of the original lease.

1. The term of the lease is extended to September 30, 1990.
2. Lessee shall pay $1800 per month.
3. Lessee shall pay an additional $1800 renewal fee which will be taken from the security deposit at once reducing the security deposit to zero.

Dated 8/23/90
Signed (Harris R. Rittoff) , (Tasker O. Generes).